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No. 372

In the Supreme Court

of the United States

October Term, [redacted] 1970

ADAM WILSON, *Petitioner*,

vs.

WINTON M. BLOUNT, Postmaster General of the United States, et al. and STATE BOARD OF SOCIAL WELFARE, DIVISION OF SERVICES FOR THE BLIND, *Respondents*.

JOE LOYA and STATE BOARD OF SOCIAL WELFARE, DIVISION OF SERVICES FOR THE BLIND, *Petitioners*,

vs.

WINTON M. BLOUNT, Postmaster General of the United States, et al., *Respondents*.

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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July, 1970

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Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Durward K. McDaniel, Attorney for Adam Wilson and Joe Loya, and Charles V. Hamm, Attorney for State Board of Social Welfare, Division of Services for the Blind, petitioners herein, respectfully

request in their behalf that the Supreme Court of the United States grant this petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on March 3, 1970.

Citations to Opinions Below

The administrative decision of Mr. Gilbert P. Mullen, Director Engineering and Facilities Division, Wichita Regional Office, Post Office Department, dated April 30, 1968, and reaffirmed May 16, 1968, is printed in the Appendix hereto at pages 26-27, and 30-31.

The Order of Mr. John L. O'Marra, Assistant Postmaster General, Bureau of Facilities, dated July 22, 1968, denying the appeal of the decision of Mr. Gilbert P. Mullen is printed in the Appendix hereto at pages 28 and 29.

The Order and Judgment of the United States District Court for the District of Kansas, entered on October 23, 1968, granting the motion to consolidate, denying the motion to abate plaintiff Adam Wilson's action, denying plaintiffs' motion for summary judgment, and granting defendants' motion for summary judgment, is unreported; it is printed in the Appendix hereto at pages 32 thru 48.

The Order and Judgment of the Tenth Circuit Court of Appeals affirming the decision of the United States District Court for the District of Kansas is unreported; it is printed in the Appendix hereto at pages 49 and 50.

Statement of Grounds on Which Jurisdiction Is Invoked

This Court is requested to grant a writ of certiorari because the Court of Appeals for the Tenth Circuit has rendered a decision in conflict with decisions of this Court on the question of standing and a decision in conflict with decisions of the Court of Appeals for the District of Columbia Circuit on the question of legal interest, and because this case raises important federal questions concerning the vending stand program, being operated pursuant to 20 U. S. C. § 107. A judgment was rendered on March 3, 1970. Petitioners' application for extension of

time within which to file this petition was granted by Mr. Justice White to July 1, 1970.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

Question Presented for Review

The question herein presented is: Do blind operators of a vending stand and the state licensing agency, operating vending stands and vending machines pursuant to 20 U. S. C. § 107, have standing to challenge the legal basis of the decision of the Postmaster General demanding the removal of vending machines from a postal facility?

Statutes and Regulations Involved

Title 5 U. S. C. § 702: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Title 18 U. S. C. § 209: "Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States . . .

"Shall be fined not more than $5000 or imprisoned not more than a year or both."

Title 20 U. S. C. § 107: "For the purpose of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves

self-supporting, blind persons licensed under the provisions of this Act shall be authorized to operate vending stands on any Federal property where such vending stands may be properly and satisfactorily operated by blind persons. In authorizing the operation of vending stands on Federal property, preference shall be given, so far as feasible, to blind persons licensed by a State agency as provided in this Act; and the head of each department or agency in control of the maintenance, operation, and protection of Federal property shall, after consultation with the Secretary, and with the approval of the President, prescribe regulations designed to assure such preference (including assignment of vending machine income to achieve and protect such preference) for such licensed blind persons without unduly inconveniencing such departments and agencies or adversely affecting the interests of the United States."

Title 28 U. S. C. § 1339: "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service."

Title 31 U. S. C. § 71: "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

Title 31 U. S. C. § 74: "Balances certified by the General Accounting Office, upon the settlement of public accounts, shall be final and conclusive upon the Executive Branch of the Government. . . .

* * *

". . . the head of any executive department . . . may apply for and the Comptroller General shall render his decision upon any question involving a payment to

be made by them or under them, which decision when rendered, shall govern the General Accounting Office in passing upon the account containing said disbursement."

Title 31 U. S. C. § 484: "The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided in section 487 of this title, shall be paid by the officer or agent receiving the same into the Treasury, at as early a date as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post Office Department."

Title 39 U. S. C. § 501: "In addition to his other duties the Postmaster General shall—

(1) prescribe rules and regulations that he deems necessary to accomplish the objectives of this title;

(2) instruct all persons in the Department with reference to their duties;

(3) decide on the forms of all official papers of the Department, except as otherwise provided by law;

(4) investigate postal offenses and civil matters relating to the Department;

(5) superintend generally the business of the Department and execute all laws relating to the Department."

Title 39 C. F. R. §§ 614.1-.5: (Since these regulations are relatively lengthy, they are printed in the Appendix hereto at pages 50 thru 56.

Title 39 C. F. R. § 742.735-25: ". . . . an employee shall not solicit or accept, directly or indirectly, any gift, gratuity, favor, entertainment, loan, or any other thing of monetary value, from a person who:

(1) Has or is seeking to obtain, contractual or other business or financial relations with the Department;

(2) Conducts operations or activities that are regulated by the Department;

Title 45 C. F. R. § 20.8 (d): "'Federal property' means any building, land, or other real property owned, leased, or occupied by any department or agency of the United States or any instrumentality wholly owned by the United States, or by any department or agency of the District of Columbia or any Territory or possession of the United States."

Volume 32 Comp. Gen. 124 (1952) and Volume 32 Comp. Gen. 282 (1952): (Since these opinions are relatively lengthy, they are printed in the Appendix hereto at pages 56 thru 63.)

Statement of Case

This case originated by the filing of a complaint by Petitioner Adam Wilson in the United States District Court for the District of Kansas against Marvin Watson, then Postmaster General of the United States; Lawson B. Knott, Director of the General Services Administration; and regional postal officials.

The Complaint of Petitioner Wilson requested the Court to enjoin the Postmaster General from enforcing the decision of the Wichita Regional Director demanding that the state licensing agency remove the vending machines being operated by Petitioner Wilson in the postal facility at 10th and Pacific Avenues, Kansas City, Kansas. This demand arose in the following manner:

Petitioner Wilson was a licensed blind operator of a vending concession in the Federal Building in Kansas City, Kansas. He was licensed for such purpose by Petitioner Kansas State Board of Social Welfare, Division of Services

for the Blind, pursuant to 20 U. S. C. § 107, said agency being the agency designated by the Secretary of Health, Education and Welfare to license blind operators of vending concessions on Federal and other property in the State of Kansas.

In accordance with the purposes of 20 U. S. C. § 107, commonly referred to as the Randolph-Sheppard Act, an agreement between the Post Office Department and the State Board of Social Welfare, Division of Services for the Blind, was entered into July 2, 1958, which provided that a portion of the net proceeds derived through operation of vending machines operated in the Post Office Building were assigned to Petitioner Wilson. These proceeds amounted to approximately $50 per week at the time this suit was instituted; and the income was necessary to enable Petitioner Wilson to be self-supporting, since the income from his vending stand operation was not adequate.

On April 30, 1968, the Post Office Department notified the State Board of Social Welfare, Division of Services for the Blind, that the agreement of July 2, 1958, would be terminated as of June 1, 1968, so that blind operators would no longer derive any income from the proceeds of vending machines in the postal facility. By letter of May 16, 1968, the State Board was informed that the income would be given to the Employee Welfare Committee for the use and benefit of the postal employees.

On May 29, 1968, pursuant to Petitioner Wilson's Complaint, the United States District Court for the District of Kansas issued a temporary restraining order directing the postal officials not to remove the vending machines operated by Petitioner Wilson.

On August 4, 1968, while motions for summary judgment were pending, Petitioner Wilson died. On August 8, 1968, Petitioner State Board of Social Welfare, Division

of Services for the Blind, filed an answer and cross-complaint, adopting the allegations of Petitioner Wilson's Complaint and requesting substantially the same relief. On August 16, 1968, Petitioner Joe Loya filed a motion to intervene on the ground that he was a licensed blind operator, having been so licensed by the State Board of Social Welfare, Division of Services for the Blind, and that he had been assigned by the agency to succeed to the vending stand operations formerly conducted by Adam Wilson, now deceased. On September 3, 1968, Petitioners Loya and State Board of Social Welfare, Division of Services for the Blind, jointly filed a Complaint against Marvin Watson, et al., substantially identical to that filed by Petitioner Wilson. Petitioner State Board of Social Welfare also alleged that its administrative appeal had been denied on July 22, 1968, by John L. O'Marra, Assistant Postmaster General, Bureau of Facilities, which denial constituted the final administrative remedy. On the same date, Petitioners Loya and State Board of Social Welfare filed a motion to consolidate their case and the Wilson case on the ground that both involved a common question of fact and law.

On October 22, 1968, by order of the District Court, the motion of Respondents to strike the cross-complaint of Petitioner State Board of Social Welfare in the Wilson case and to abate that action was denied. The two cases were consolidated. Judgment was entered on October 28, 1968, denying Petitioners' motion for summary judgment and granting Respondents' motion for summary judgment.

Petitioners appealed the decision of the District Court, and on March 3, 1970, the decision was affirmed by the Court of Appeals for the Tenth Circuit for the reasons stated in the opinion of the District Court.

Your Petitioners request this Court to grant a Writ of

Certiorari to review the decision of the Court of Appeals for the Tenth Circuit in this case, which decision held that Petitioners do not have standing to challenge the legal basis of the Postmaster General's decision demanding the removal of vending machines being operated by licensed blind operators at the postal facility at 10th and Pacific Avenues, Kansas City, Kansas.

Reasons for Allowance of Writ

Your Petitioners believe that there are four reasons why this Court should grant a writ of certiorari to review the decision of the Tenth Circuit Court of Appeals:

First, this case indicates that there is still some confusion about the concept of standing, despite this Court's decisions in *Flast*, *Hardin*, *Barlow*, and *Data Processing*; the decision of the Tenth Circuit is in conflict with this Court's decisions.

Second, the decision of the Tenth Circuit is in direct conflict with decisions of the District of Columbia Circuit Court of Appeals on the question of what constitutes the "legal interest" that will receive a court's protection; since the Court has recently elaborated on the concept of standing, it should now undertake to elaborate on the closely related concept of "legal interest."

Third, this case presents a rare opportunity for the Court to define the limits of authority of the Postmaster General in negotiating with postal unions; this is an important federal question in light of the expanded rights being given to postal unions and the unions' increased exercise of their powers.

Fourth, this case is important because it will be used as precedent in situations involving hundreds of other blind operators who do not have the resources to engage in protracted judicial proceedings; if the Court does not

reverse the decision of the Tenth Circuit, government agencies will cite the case for the proposition that, despite the congressional scheme to assist the blind, the blind may not challenge adverse agency action, no matter how arbitrary, capricious, or illegal it may be.

I.—STANDING

Your Petitioners argue that the decision of the Tenth Circuit represents a confusion of two separate questions —the question of standing and the question of "legal interest." This confusion is indicated by the following statement in the opinion of the District Court, which was endorsed by the Tenth Circuit Court of Appeals:

> The fact that income from the machines may be diverted to Postal Employee's Associations is not an act which plaintiffs have standing to challenge. There is no invasion of the legal rights of plaintiffs which they have standing to protect and though the disposition of the income from operations of the vending machines may be illegal, as plaintiffs assert, still they lack standing to enjoin such action and the officials of the Post Office Department because no invasion of their legal rights exists.

To the extent that this ruling imposes a requirement that conditions standing on a showing by the plaintiff that the challenged governmental action invades one of his legally protected interests, it is in conflict with recent decisions of this Court. To the extent that the ruling does not recognize a "legal interest" where illegal agency action deprives plaintiff of income received pursuant to federal law, it is in conflict with the decisions of the District of Columbia Court of Appeals (discussed *infra* in Part II).

Your Petitioners state that this Court began to expand the concept of standing in Hardin v. Kentucky Utilities Co., 390 U. S. 1 (1968), which involved a section of the

TVA Act designed primarily to protect, through area limitations, private utilities against TVA competition. This Court held that no explicit statutory provision was necessary to confer standing, since the private utility bringing suit was within the class of persons that the statutory provision was designed to protect.

Your Petitioners state that the next important case involving the concept of standing is Flast v. Cohen, 392 U. S. 83 (1968), which involved a taxpayer's challenge of a congressional appropriation for schools. This Court confirmed that the gist of the question of standing is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions."

Your Petitioners state that the next important case is Association of Data Processing Service Organizations, Inc. v. Camp, 397 U. S. 150 (1970) which involved a challenge by competitors of national banks to a ruling by the Comptroller of the Currency. The Court stated that the question of standing is concerned with "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." On the other hand, the question of "legal interest" goes to the merits. In addition, this Court stated that the two other tests for standing are whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise; and whether judicial review of the agency action has been precluded by Congress.

Your Petitioners state that the next important case is Barlow v. Collins, 397 U. S. 159 (1970), in which tenant farmers eligible for payments under the upland cotton

program, challenged the validity of an amended regulation issued by the Secretary of Agriculture. This Court applied the three-step test enunciated in *Data Processing* to hold that the petitioners had standing.

Your petitioners argue that, on the basis of this Court's decisions discussed above, there is no doubt that Petitioners have standing to challenge the action of the Postmaster General; and that, therefore, the decision of the Tenth Circuit denying standing is in conflict with the decisions of this Court. Your petitioners adequately meet all three tests applied in *Data Processing* and *Barlow*:

First, the blind operators have alleged a direct economic injury resulting from the agency action—a loss of half their income.

Second, the blind operators are clearly within the zone of protection of the Randolph-Sheppard Act, 20 U.S.C. § 107.

Third, the right of judicial review is inferred because of the congressional intent to protect the interests of blind operators; there is no statute precluding judicial review of the Postmaster General's action. The state licensing agency has standing on behalf of the blind operators because it has been entrusted by federal law with administering the vending stand program for the blind. The loss of the postal facility as a source of income would mean that fewer blind persons would participate in the program.

II.—LEGAL INTEREST

In the *Data Processing* case, this Court noted the close relationship between the concepts of standing and of legal interest; but it elaborated on only the former. Your Petitioners argue that the decisions of this Court on standing will represent only sterile victories for plaintiffs challenging illegal or arbitrary agency action unless this Court

takes the next logical step of elaborating on the concept of legal interest. For, as a practical matter, most agency actions will continue to be immunized because many courts, while granting standing in accord with the decisions of this Court, will not decide the legality of the agency action on the ground that they cannot find a legal interest of plaintiff.

Your Petitioners argue that the concept of legal interest is as critical as the concept of standing; and it is a concept which has caused confusion in the Circuit Courts. Despite this Court's general renunciation of the rights v. privilege dichotomy, some Circuit Courts continue to distinguish between "rights," "privileges," "licenses," and "preferences" in determining whether to examine the legality of agency action. As Mr. Chief Justice Burger said, in Gonzales v. Freeman, 334 F. 2d 570 (D. C. Cir. 1964), "use of such terms as 'right' or 'privilege' tends to confuse the issues."

Your Petitioners urge that this Court rule that plaintiff meets the test of legal interest for purposes of challenging allegedly illegal or arbitrary action if the agency action interferes with an advantageous relationship being enjoyed by plaintiff, no matter whether that relationship be termed "right," "privilege," "license," or "preference." This is essentially the position of the District of Columbia Circuit Court of Appeals; and it is in direct conflict with the position of the Tenth Circuit, which is indicated by the following statements in the instant case:

> Plaintiffs' claim must be sustained, if at all, on the basis of rights afforded them under the terms and provisions of the Randolph-Sheppard Act, and the rules and regulations adopted pursuant thereto, and not upon the contentions that officers of the Postal Department are failing to follow guidelines set out

> for them under statutes and regulations controlling their activities as officers of the Postal Department.
>
> * * *
>
> . . . and though the disposition of the income from operations of the vending machines may be illegal, as plaintiffs assert, still they lack standing to enjoin such action and the officials of the Post Office Department because no invasion of their legal rights exists.

Because of the position of the Tenth Circuit that plaintiffs must establish a "legal right" even if the agency action directly affecting them is illegal, the legality of the Postmaster General's action was never determined.

Decisions of the District of Columbia Circuit Court of Appeals

The first case cited by your Petitioners for the position of the District of Columbia Circuit on the question of the right to challenge agency action as arbitrary or illegal is Rudder v. United States, 226 F. 2d 51 (D. C. Cir. 1955), which involved an attempt by the Government to evict tenants in a low-income housing unit owned by the Government because the tenants refused to sign a certification that they were not members of certain designated organizations. Although the Court recognized that, in regard to a month-to-month tenancy under the D. C. Code, a landlord was not required to give a reason for termination of the lease, the Court ruled (at page 53):

> The government as landlord is still the government. It must not act arbitrarily, for, unlike private landlords, it is subject to the requirements of due process of law. Arbitrary action is not due process of law.

The Court held in favor of the tenants because refusal to sign was not proof of membership and, further, membership in the listed organizations was not necessarily a valid ground for eviction.

Your Petitioners state that the next case bearing on the point is Gonzales v. Freeman, 334 F. 2d 570 (D. C. Cir. 1964), in which plaintiffs, who had a record of contractual relations with the Commodity Credit Corporation for a number of years, challenged their debarment from further business with the Corporation. Mr. Chief Justice Burger, then Judge Burger, speaking for the Court, said:

> It is equally correct, broadly speaking, to say that no citizen has a "right," in the sense of a legal right, to do business with the Government. . . . But the use of such terms as "right" or "privilege" tends to confuse the issues presented by debarment action. Interruption of an existing relationship between the government and a contractor places the latter in a different posture from one initially seeking government contracts and can carry with it grave economic consequences.
>
> * * *
>
> Thus to say that there is no "right" to government contracts does not resolve the question of justiciability. Of course, there is no such right; but that cannot mean that the government can act arbitrarily, either substantively or procedurally, against a person or that such person is not entitled to challenge the processes and the evidence before he is officially declared ineligible for government contracts. An allegation of facts which reveal an absence of legal authority or basic fairness in the method of imposing debarment present a justiciable controversy in our view. The injury to appellants alleged in their complaint gives them standing to challenge the debarment processes by which such injury was imposed. . . .

The Court decided that the debarment was invalid because it was arbitrary, capricious, and in excess of statutory authority since it was imposed without observance of procedural requirements.

Your Petitioners state that the most recent case directly bearing on the problem is Overseas Media Corp. v. McNamara, 385 F. 2d 308 (D. C. Cir. 1967), in which the Court held that the Secretary of Defense, purportedly acting without reference to established criteria, does not have the power, insulated from judicial review, to deny to publishers of a newspaper access to post exchange newsstands in the Far East when it is alleged that he has granted such access to similarly situated publishers. The Department had argued that space limitations and saturation by other publications justified denial of access to the plaintiffs. The Court held that the decision could be challenged since it was unrelated to the conduct of military operations; and, in reviewing the decision, the Court found that it was not justified by the facts.

Your Petitioners argue that, according to the decisions of the District of Columbia Circuit Court of Appeals discussed above, they would have been permitted to challenge the Postmaster General's action had the suit been brought in the District of Columbia. Your Petitioners ask this Court to bring the Circuit Courts in uniformity by adopting the position of the District of Columbia Circuit Court, which is more in accord with the decisions of this Court. See, *e. g.*, the concurring opinion of Mr. Justice Douglas in Thorpe v. Housing Authority of the City of Durham, 386 U. S. 670 (1967), in which he cites the *Rudder* case.

PETITIONERS' ALLEGATIONS OF ARBITRARINESS AND ILLEGALITY

Your Petitioners argue that they presented a *prima facie* case of arbitrariness and illegality to the Tenth Circuit which justified questioning the legality of the action of the Postmaster General. Four independent grounds were asserted:

First, the initial reason given by the Postmaster General

was that the blind operators did not have the right to operate vending machines in employee areas (see Letter of April 30, 1968, of Mr. Mullen, reprinted in Appendix, page 26). This reason found no support in the regulations of the Department of Health, Education and Welfare (45 C. F. R. § 20.8 [*d*]), which make no distinction between "public areas" and "employee areas." It found no support in the ruling of the Comptroller General in direct response to a question involving vending stands and machines being operated by the blind (32 Comp. Gen. 282 (1952)); by implication, this decision indicated that the blind could operate vending machines in employee areas. Finally, the reason was not one specified in the regulations of the Post Office Department itself (39 C. F. R. § 614.3); the regulation authorized the removal of the machines "when necessary because of changes in building operations or space requirements."

Second, the subsequently stated reason that the "operation of these vending machines by the State Department of Social Welfare is an encroachment upon the rights of the employee organizations" (Letter of May 16, 1968, of Mr. Mullen, reprinted in Appendix at page 30) was also unjustified. The postal union contract did not confer an affirmative right to vending machine income but only provided the procedure for handling of the income where the machines were currently being operated by employee groups.

Third, the Postmaster General's action is illegal under federal law. In two opinions (32 Comp. Gen. 124 (1952) and 32 Comp. Gen. 282 (1952)), the Comptroller General held that receipts from vending machines, including those located in postal facilities, were funds of the United States and could not be turned over to employee groups. (One of these decisions was a response to a question by the Postmaster General.) Under 31 U. S. C. § 71 and 31 U. S. C.

§ 74, the Postmaster General is conclusively bound by these rulings.

Fourth, under 18 U. S. C. § 209 and 39 C. F. R. § 742. 735-25, employees are prohibited from accepting vending machine income.

Your Petitioners argue that their *prima facie* case of arbitrariness and illegality, coupled with a statutory interest under 20 U. S. C. § 107 and an already existing relationship between the blind operators and the Post Office, presents a stronger showing of "legal interest" than is found in any of the above-cited cases of the District of Columbia Circuit, in which plaintiffs were permitted to challenge the agency action.

III.—POSTMASTER GENERAL'S AUTHORITY IN NEGOTIATIONS WITH POSTAL UNIONS.

This Court is no doubt aware of the expanded collective bargaining rights being given to governmental employees and, in particular, postal employees. In recent years, there has been greater activisim by these unions. The Postmaster General has been acceding to a number of demands by granting concessions to the unions, the legal authority of which has not been judicially tested. The effectiveness of the postal unions is underscored by this statement in Mr. Mullen's Letter of May 16, 1968: "the operation of these vending machines by the State Department of Social Welfare is an encroachment on the rights of the employee organizations." Hence, the Postmaster General has elevated the concessions to the employees to the status of "rights."

Vending machines in postal facilities constitute a lucrative source of income; thus, it is understandable that postal unions are desirous of the income for their recreation fund —in effect, a supplement of salary. However, your Petitioners argue that Congress has, on many occasions,

asserted its prerogative to determine the appropriate compensation for the work of postal employees; it has not delegated authority to the Postmaster General to adjust salary and fringe benefits according to his determination of appropriate compensation. The Postmaster General may not use vending machine income for this purpose. The Comptroller General ruled (32 Comp. Gen. 124, 125-26 [1952]):

> . . . funds derived from the installation and operation of vending machines, on Government-owned or controlled property, are funds received "for the use of the United States" within the meaning of that phrase as used in the provision of the law (31 U. S. C. § 484) . . . and, as such, are required to be deposited into the Treasury of the United States as miscellaneous receipts, in the absence of express statutory authority to the contrary.

Accordingly, the Postmaster General is authorized to do only two things with vending machine income: either turn the money over to the Treasury, pursuant to 31 U. S. C. § 484, or permit blind operators to receive it, pursuant to 20 U. S. C. § 107; 20 U. S. C. § 107 makes clear that the latter course should be followed if the income from the vending *stand* is not adequate.

Until recently, the postal unions were content to operate vending machines where they were not being operated by the blind. (Your Petitioners argue that there was no legal authority for such operations.) This case represents an attempt by the unions to expand their recreation fund by demanding the removal of machines being operated by the blind so that the postal employees may install their own machines.

Your Petitioners argue that they are proper parties to challenge the authority of the Postmaster General to allow postal employees to receive the vending machine income

because the blind operators are directly affected by the agency action. But, in another sense, your Petitioners have standing as private attorneys general to enforce the ruling of the Comptroller General. If your Petitioners are not authorized to challenge the Postmaster General's action, then his decisions are effectively immunized, no matter how contrary to law. Because of the policy against suits between departments of Government, the Comptroller General is unlikely to enforce his rulings. This case presents an appropriate vehicle for enforcement of that ruling.

IV.—IMPORTANCE TO BLIND OPERATORS

The blind have frequently asked Congress and business for the opportunities to prove that they could be self-supporting, that they did not have to add their names to already-swelled welfare rolls. In the Randolph-Sheppard Act, Congress seized upon the opportunity of vending stands in Federal buildings to devise a plan that would assist the blind in their objective. The plan was simple: allow the blind to operate the vending stands and, if the income from the stands was not adequate, allow them to operate vending machines in the buildings. At the present time, about 900 vending stands are being operated by the blind.

Your Petitioners state that the decision of the Tenth Circuit, if not reversed by this Court, will be used as precedent by governmental agencies in support of the proposition that the agencies may deprive blind operators of vending machine income and that their decision—albeit illegal, arbitrary, and capricious—may not be challenged. In view of the increased activism on the part of governmental employees, it is likely that the decision of the Tenth Circuit will jeopardize the vending stand program and the interests of numerous blind operators similarly situated. Your Petitioners ask this Court to protect the

congressional scheme embodied in the Randolph-Sheppard Act.

* * *

Wherefore, your Petitioners pray that a Writ of Certiorari be granted and issued by this Court to review the judgment of the Court of Appeals for the Tenth Circuit in the above-entitled case.

DURWARD K. MCDANIEL
Suite 215,
20 E Street, N. W.,
Washington, D. C. 20001
Attorney for Petitioners,
Adam Wilson and Joe Loya
CHARLES V. HAMM
State Office Building,
Topeka, Kansas
Attorney for Petitioner,
State Board of Social
Welfare, Division of
Services for the Blind

July, 1970

APPENDIX 24

POST OFFICE DEPARTMENT
Wichita Regional Office
Main Post Office Building
Wichita, Kansas 67225

Our file: 72-PCA:bc
April 30, 1968

Mr. Stuart W. Engle, General Manager
Kansas Industries for the Blind
State Department of Social Welfare
State Office Building
Topeka, Kansas 66612

Dear Mr. Engle:

On July 2, 1958, the Post Office Department approved

your application to establish a vending stand in the post office facility at Kansas City, Kansas, at 10th and Pacific Avenue. The application consisted of 15 vending machines in the swingroom, motor vehicle garage and workroom. The approved application provides that your agency will remove the equipment provided by you at any time upon request by the Post Office Department.

These machines in the building do not serve the general public but are utilized only by Post Office Department employees. We are, therefore, requesting that all vending machines operated by you be removed from the building on or before May 31, 1968.

It is our understanding that the intent of the Randolph-Sheppard Act is to provide employment for the visually handicapped. The arrangement at this facility wherein vending machines are utilized by employees in restricted areas does not, in our opinion, serve that purpose.

Sincerely yours,
GILBERT P. MULLEN
Director
Engineering and Facilities Division

Post Office Department
ASSISTANT POSTMASTER GENERAL
Bureau of Facilities
Washington, D. C. 20260

July 22, 1968

Mr. Harry E. Hayes
Director, Services for the Blind
State Department of Social Welfare
State Office Building
Topeka, Kansas 66612

Dear Mr. Hayes:

This has reference to your appeal of the decision of the Regional Director, Post Office Department, Wichita, Kansas, revoking the license of your agency for the operation of vending machines and requiring removal of these machines from the Kansas City, Kansas, Post Office, located at 10th and Pacific Avenue.

It is my conclusion the decision of the Regional Director should be upheld and thus, the appeal of your agency is denied. The Randolph-Sheppard Act provides preference in the installation and operation by the blind of vending stands on public properties where it will not interfere with public business. This preference does not extend to the operation of vending machines. Your organization has determined the installation of a vending stand is not warranted. Further, the license under which you have operated these vending machines in this building states that it may be revoked at anytime.

The Post Office Department complies with the requirements of the Randolph-Sheppard Act. Where the income of the blind operator of a vending stand is not considered adequate a postmaster may arrange for distribution of profits from machines operated by employee committees. An adequate income for this purpose is considered to be

the average income of the average employee of the postal installation.

Further, the Post Office Department provides that when employee committees contract with outside firms to install, operate and maintain vending machines, the contract must specify that: (*a*) the vending machine company which is awarded the contract shall hire visually handicapped persons to the maximum extent possible to operate, maintain, and service the machines, and (*b*) the contractor shall train the visually handicapped persons in the operation of the machines.

Thus, in this instance, even though further operation of vending machines will not be by your organization, the visually handicapped will benefit because any contract for services will require the hiring of the visually handicapped to the maximum extent possible and their training for operation of machines. Therefore, it is possible more than one visually handicapped person may benefit.

I would appreciate your cooperation with the Regional Director and early removal of your machines from the postal facility located at 10th and Pacific Avenue.

Sincerely,

JOHN L. O'MARRA
Assistant Postmaster General

Copy to: Regional Director
Wichita, Kansas

POST OFFICE DEPARTMENT
Wichita Regional Office
Main Post Office Building
Wichita, Kansas 67225

Our file: 72-PCA:bc
May 16, 1968

Mr. Harry E. Hayes, Director
Services for the Blind
State Department of Social Welfare
State Office Building
Topeka, Kansas 66612

Dear Mr. Hayes:

We are sorry that we are not in a position to withdraw our removal request relative to the vending machines in the Kansas City, Kansas, Post Office at 10th and Pacific Streets.

During recent years the Post Office Department has entered into national agreements with postal employees' organizations whereby vending machines can be operated in workroom and swingroom areas of post office facilities. Since the vending machines at the Kansas City 10th and Pacific location are within areas restricted to post office employees only, the operation of these vending machines by the State Department of Social Welfare is an encroachment on the rights of the employee organizations.

There is no direct relationship between the blind operator of the vending stand in the Downtown Federal Building operated by General Services Administration and the leased post office facility located some two miles away operated by the Post Office Department. Therefore, our recent request for the removal of the machines is not, in my opinion, contrary with the provisions of the Randolph-Sheppard Act.

We are sympathetic to the commendable program operated by your organization for the visually handicapped and do regret the necessity of this action.

Sincerely yours,
GILBERT P. MULLEN
Director
Engineering and Facilities Division

In the District Court

of the United States

For the District of Kansas

ADAM WILSON, *Plaintiff*, *vs.* MARVIN WATSON, Postmaster General of the United States, et al., *Defendants*.	Civil Action No. KC-2793
JOE LOYA and STATE BOARD OF SOCIAL WELFARE, DIVISION OF SERVICES FOR THE BLIND, *Plaintiffs*, *vs.* MARVIN WATSON, Postmaster General of the United States, et al., *Defendants*.	Civil Action No. T-4483

Memorandum of Decision

On May 29, 1968, plaintiff Wilson filed a complaint in this Court under provisions of 5 U. S. C. §§ 701-706; 20 U. S. C. § 107; 28 U. S. C. § 1361; 28 U. S. C. § 2201; and Rule 65 of the Federal Rules of Civil Procedure. The action bears Clerk's number KC-2793. He alleged that his claim has a value of more than $10,000, and claims that the basis of his action requires an interpretation of the United States Constitution, Acts of Congress, and Federal regulations.

In substance, plaintiff alleged in that case that he was a licensed blind operator of a vending concession in the Federal Building at 812 North 7th Street, in Kansas City,

Kansas, and that he was licensed for such purpose by the State Board of Social Welfare, Division of Services for the Blind, pursuant to 20 U. S. C. § 107; that such agency is the one designated by the Secretary of Health, Education, and Welfare to license blind operators for vending concessions on Federal and other property in the State of Kansas; that defendants Watson, Mullen and Meyer are officials exercising de facto control over the Federal property affected by this action and threaten action adverse to plaintiff's rights; that defendant Knott is custodian of Federal property under control of General Services Administration with the power and duty to regulate vending concessions on property occupied by the Post Office Department.

The Plaintiff further alleged that Canteen Corporation has a number of vending machines located and operated on Federal leased property at Tenth and Pacific Streets in Kansas City, Kansas, under an agreement between the Post Office Department and the State Board of Social Welfare, Division of Services for the Blind, as authorized by 20 U. S. C. § 107; that a portion of net proceeds from operation of these vending machines has been assigned to plaintiff and amounts to approximately $50.00 per week, and is about one-half of plaintiff's income by which he supports himself and family. Plaintiff further alleges that defendants and the Post Office Department have arbitrarily exceeded their authority and duty in canceling the agreement contrary to provisions of Randolph-Sheppard Act. (20 U. S. C. § 107, *et seq.*), and P. O. Regulation 30 CFR 614.3, because the order of cancellation is based on reasons other than those authorized by the regulation, the reason being, in substance, that the Post Office Department had entered into agreements with postal employees' organizations whereby the vending machines in workrooms or

swingrooms of post office facilities were to be operated for the benefit of such postal employees' organizations and excluding machines operated by licensees of the State Department of Social Welfare; that the Postmaster General has arbitrarily exceeded his authority and power in entering into such agreements with the employees' organizations and the contracts made with the postal employees' unions are in contravention of the statutory sanction of the programs and authority created by the Randolph-Sheppard Act.

The plaintiff also alleges that defendant Knott, acting for General Services Administration, defaulted in his duty by undertaking to exempt the Post Office Department from regulations governing vending concessions on Federal property and particularly 41 CFR § 101-19.200b; that compliance with the Post Office order to remove the machines from the workroom or swingroom would cause a pecuniary loss to the Canteen Corporation as would the restoration or replacement of the machines on the premises.

Plaintiff asks that the defendants be restrained from carrying out the order of the Post Office Department requiring the state licensing agency to remove the machines from the premises of the Post Office at Tenth and Pacific, in Kansas City, Kansas, to prevent irreparable pecuniary loss to plaintiff and unjust expense to Canteen Corporation; also for declaratory judgment construing validity of union contracts with the Post Office Department and their constitutionality, and the statutory power of the Postmaster General to make such agreements; and, likewise, construing power of defendant Knott to delegate authority of General Services Administration relating to vending concessions to the Post Office Department; interpreting and construing 39 U. S. C. § 501 and 20 U. S. C. § 107, as they apply to machines on Federal property and construing

authority of the Postmaster General to grant employees a concession for their private profit, operated on Federal property, without regard to work performed or salaries earned by such employees.

On May 29, 1968, on application of the plaintiff, the Court issued a temporary restraining order directing defendants not to remove machines from the Post Office Building at Tenth and Pacific Streets, in Kansas City, Kansas. The machines have not been removed and the matter has been left "as is" pending the determination of the case.

Thereafter, on June 10, 1968, defendants filed a motion to dismiss the action, or in the alternative for summary judgment, on the following grounds:

1. The Court lacks jurisdiction for the reason that the action is in reality a suit against the United States to which it has not consented.
2. The complaint fails to state a claim upon which relief can be granted.
3. The action is not instituted by the real party in interest.
4. The action seeks to control the discretionary acts of government officials.

The parties entered into a pre-trial stipulation which provided, in substance, that the issues of the case are as follows:

1. The issues raised in the motion of the defendant to dismiss or in the alternative for summary judgment.
2. Can the permit or license from the Postmaster to the State Board of Social Welfare be revoked under the facts involved in the action?
3. Is the delegation as published in the Federal Register by General Services Administration to the Post Office Department or Postmaster General relative to the regulation and establishment of vending machines in

the swingrooms and workrooms of post offices in premises under control of the Postmaster valid?

4. Are regulations promulgated by the Post Office Department signed by the General Counsel of the Post Office Department pertaining to the regulations of vending stands or machines in swingrooms and workrooms and other parts of buildings under the control of the Post Office Department valid?
5. Is the contract between the postal unions and the Postmaster General valid, or, in other words, did the Postmaster General have authority to enter into such union contract and empower employee welfare committees to contract for operations of vending machines through open competitive bidding and to derive revenue from vending machines in swingrooms and workrooms.
6. Is the plaintiff a proper person to maintain this action, and, if so, has he exhausted his administrative remedies?

On August 1, 1968, plaintiff filed an amended and supplemental complaint alleging, in substance, that agency actions complained of are void because they are contrary to the provisions of the Randolph-Sheppard Act and official regulations promulgated thereunder; that the regulations promulgated under which defendent Postmaster General purports to act are void because they are not adopted in the manner required by law; that the agency actions complained of are contrary to the decisions of the Comptroller General; that the agency actions complained of are against public policy because they are an unlawful supplementation of salaries of Federal employees through private concessions; that they are void because they are in violation of the provisions of the Randolph-Sheppard Act. Plaintiff, by such amended and supplemental complaint, seeks an

adjudication that the regulations of the Postmaster General are invalid; that the decisions of the Comptroller General control; and that the applicability of 18 U. S. C. § 209 and 31 U. S. C. § 484 to the issues of this case should be construed.

Thereafter, and on August 1, 1968, plaintiff filed a motion for summary judgment.

From the record, it is made to appear that on August 4, 1968, plaintiff Wilson died, and on August 5, 1968, defendants filed a motion asking that the action be abated because no rights asserted by plaintiff inured to his estate.

On August 8, 1968, defendant State Board of Social Welfare, Division of Services for the Blind, filed an answer and cross-complaint, adopting the allegations of plaintiff Wilson's complaint, and further alleging that it is the state licensing agency designated by the Secretary of Health, Education, and Welfare to license blind operators of vending concessions on Federal and other property in Kansas; and that it is directed by law to secure locations for vending machines to be operated by blind persons chosen by such defendant.

The defendant, State Board of Social Welfare, Division of Services for the Blind, then, on August 15, 1968, filed its motion for summary judgment. On August 16, 1968, one Joe Loya filed a motion to intervene in such action on the ground that he is a licensed blind vending stand operator, having been so licensed for that purpose by the defendant, State Board of Social Welfare, Division of Services for the Blind, and that he has been assigned by that licensing agency to succeed to the vending stand operations formerly conducted by Adam Wilson, now deceased. To this motion to intervene, the defendant, United States of America, on August 28, 1968, filed a motion to strike the motion to intervene of Loya and the cross-complaint of the State Board of Social Welfare because, as it alleged:

(1) The pleading was filed out of time, without leave of Court and after the action had abated.

(2) The claim attempted to be set up is an action against the United States for which no consent has been given to sue it.

(3) The cross-claim does not state facts upon which relief can be granted.

On September 3, 1968, a complaint was filed by Joe Loya and the State Board of Social Welfare, Division of Services for the Blind, against defendants Watson, Mullen, Meyer, and Knott, named in Case No. KC-2793, as defendants therein. This action bears Clerk's Case No. T-4483. Substantially, it makes the same allegations as were contained in the complaint, the amendment and supplemental complaint in Case No. KC-2793, except that Canteen Corporation is not included in the action.

Thereafter, on September 3, 1968, plaintiffs in Case No. T-4483, and cross-claimant, State Board of Social Welfare, in Case No. KC-2793, filed separate motions to consolidate the two actions because both involve a common question of law or fact.

The motion of defendants to abate the action of *Wilson v. Watson*, being Case No. KC-2793, will first be considered. This motion will be considered under the provisions of Rule 25. Though plaintiff Wilson's death abated his action as to his claims, the Court believes it is perfectly proper to proceed despite his death on rights and claims existing between the remaining parties, and the motion of defendants to abate the entire action must be denied, and the motion to strike the cross-complaint of the defendant, State Board of Social Welfare, must be overruled.

Since Case No. KC-2793 and Case No. T-4483 involve substantially the same fundamental questions and the same basic requests for relief, they will be consolidated for the

purpose of considering the cross-motions of the parties for summary judgment.

The defendants, Post Office officials, contend:

(1) That the Court lacks jurisdiction;

(2) That complaint of Loya and State Board of Social Welfare and the cross-complaint of the State Board of Social Welfare fail to state a claim on which relief can be granted;

(3) The action seeks to control discretionary functions of Government officials.

The parties entered into a stipulation in KC-2793, which the Court believes is substantially applicable to both cases. Defendants question the Court's jurisdiction but the Court now rules that under the pleadings before the Court, jurisdiction lies, as claimed under provisions of 28 U. S. C. § 1339, 5 U. S. C. § 702, and under the well-known rule that an action may be maintained against an officer of the United States if the officer is not doing the business which the sovereign has empowered him to do or is doing it in a way which is forbidden. See *Larson v. Domestic and Foreign Commerce Corporation*, 337 U. S. 682.

Plaintiff's right to relief must rest upon the laws of the United States and the privileges granted by Congress to blind persons under the so-called Randolph-Sheppard Act, 20 U. S. C. § 107, and pursuant to regulations provided for and adopted under the provisions of said Act.

Plaintiff Loya is successor licensee of plaintiff Wilson, deceased, by license of the State Board of Social Welfare, Division of Services for the Blind, to operate a vending stand operation in a Federal Building in Kansas City, Kansas. He is now operating this stand which is in a building under control of General Services Administration, and no question is presented here as to the right of Loya to operate that stand as licensee of the State Department.

The dispute arises over an installation of vending machines in the "workrooms and swingrooms utilized by postal employees" in a building located at Tenth and Pacific in Kansas City, Kansas, under the jurisdiction and operated by the Post Office Department and located a distance of two miles from the building in which Loya's stand is located and operated.

The space in which the vending machines were installed was provided for by an application (Exhibit A) to the Post Office Department by the licensing agency of the Secretary of Health, Education, and Welfare, for leave to do so, and the approval of the application by the Acting Postmaster on July 2, 1968. The application and acceptance provided that:

> "It is agreed that this stand will be removed by the licensing agency at any time upon request of the Federal Department in charge of this building."

Following the approval of the application for space by the Postmaster, the Canteen Company of Kansas City, proposed to place vending machines in the space so approved and agreed to pay certain commissions to the blind fund out of which allocations were made to supplement income for licensed blind persons whose profits from stands which they operated are insufficient to provide such licensee with an adequate income as provided by the terms of 39 CFR 743.5, and Postal Regulations 743.541.

It appears that for the past several years this arrangement has been continued and the income (commissions) paid to the licensee of the State Department of Welfare to supplement the income received from the operation of the stand by a licensee in the Federal Building located at 812 North 7th Street in Kansas City, Kansas.

Now, the defendants have, as June 1, 1968, notified the State Board of Social Welfare that the agreement of July 2,

1958, is terminated and that blind operators will no longer derive any income from the net proceeds of the vending machines operated in the Post Office Building. Defendants have also ordered that the vending machines in question be removed from the Post Office Building by Canteen Corporation. This termination of the agreement relating to the vending machines in the Post Office Building does not affect the licensing of blind persons to operate a vending stand in the Federal Building on Seventh Street, and plaintiff Loya is so operating it.

Plaintiffs insist that this action by the Post Office Department is arbitrary and that it unlawfully deprives the plaintiffs of rights and interests they have and defeats the Congressional purpose and intent expressed in 20 U. S. C. § 107. This Court is extremely sympathetic to the claims of plaintiffs and would agree that if the Congressional Act relied upon granted the right in them that cannot be interfered with by the defendants, then they are entitled to a declaratory judgment so concluding, to an order requiring defendants to conform to such a judgment, and to an injunction prohibiting the defendants from enforcing their order to remove the vending machines from the Post Office Building.

The Court has reviewed the maze of laws and regulations adopted by the different government agencies involved. Plaintiffs' claim must be sustained, if at all, on the basis of rights afforded them under the terms and provisions of the Randolph-Sheppard Act, and the rules and regulations adopted pursuant thereto, and not upon the contentions that officers of the Postal Department are failing to follow guidelines set out for them under statutes and regulations controlling their activities as officers of the Postal Department.

41 CFR 101-19.200 is a regulation adopted for the pur-

pose of assuring the granting of preference to blind persons licensed under the provisions of the Randolph-Sheppard Act for the operation of vending stands and machines. The regulation was issued after consultation with the Department of Health, Education, and Welfare, and with approval of the Bureau of the Budget. Subsection (*b*) of such regulation reads as follows:

> "The regulation in this subpart shall apply to Federal property owned, leased, or occupied by the United States over which General Services Administration has control of the maintenance, operation, and protection, except space used by Post Office Department as workrooms, swingrooms, and locker rooms. Vending machines and stands in these rooms are governed by regulations issued by the Post Office Department."

The applicable Postal regulation appears to be 743.541. It provides, in substance, that profits from all vending machines presently operated by a licensed blind operator of a lobby stand, either in conjunction with his stand or in other areas of the *same building* under control of the Post Office Department shall be assigned to the blind operator. (Emphasis supplied.) The defendants properly contend that the swingroom, workrooms and locker rooms in the Post Office Building are not in the same building as is plaintiff's vending stand, and, for this reason, income or revenue from them is not properly assignable to the plaintiff or plaintiff's licensee.

Plaintiff Loya makes no claim that he has not been given preference with respect to the stand itself in the Federal Building on Seventh Street. The essence of plaintiff's claim is that by assuring blind persons of a preference in the operation of vending machines on Federal property, the Randolph-Sheppard Act does not permit the Post Office Department to cancel a lease which plaintiffs held and

then authorize employee committees to operate vending machines in the same space. The claim of plaintiffs, simply stated, is that the rules and regulations of the Post Office Department violate the provisions of the Randolph-Sheppard Act. But here, plaintiffs have no vending machines in the building where is located the vending stand operated by licensee Loya. As defendants insist, the vending machines are in the workrooms and swingrooms of the Post Office Building, two miles away. Plaintiffs do not contend these machines are being operated in close proximity to the vending stand in the Federal Building or that they are in competition with the stand.

Thus, the question arises, where for the past several years commissions from vending machines have been assigned to the blind operator of a stand in another building, may the officers of the Post Office Department, under any valid regulation, require the removal of the vending machines and thus withdraw from the licensed blind operator of the stand, the supplemental income from them.

The claim of plaintiffs that the Postal regulations and the actions of the defendants under them are invalid and illegal because they are contrary to the provisions of the Randolph-Sheppard Act presents the threshold question here for if this contention of the plaintiffs is correct, then summary judgment does not lie for the defendants.

The Court cannot say that the regulations herein set forth are invalid. While the Act provides that "preference shall be given, so far as feasible, to blind persons, to operate vending stands," no explicit provision is made for a preference with respect to automatic vending machines. The legislative history, upon examination, reveals that Congress considered the competition which blind vending stand operators must experience from employee-operated automatic vending machines and rejected proposals designed to insure that they would be given such preference. At 100

Congressional Record, 9923, it appears that an amendment which would have given blind operators preference for vending machines was considered and sent to the Conference Committee. Then at 100 Congressional Record, 9958-60, it appears that the House discussed the question of whether blind operators or employee committees should operate and receive profits from automatic machines, and also a proposal was advanced which would have given the blind operator this right but was not adopted. As finally passed by Congress, the provisions of the Randolph-Sheppard Act contain no preference for operation of vending machines by blind persons. See 100 Congressional Record, 10829, 10831. The claim of plaintiffs that a blind licensee has the exclusive right to operate vending machines in a Post Office Building is not sustained by the record. Though it may be argued that the regulations adopted, and under which defendants are acting, are contrary to the spirit and purpose of the Randolph-Sheppard Act, since it certainly was the purpose of that legislation to provide a means for blind persons to become self-supporting, the Court cannot overlook the fact that the interpretation upon which plaintiffs insist was definitely rejected by the Congress which enacted the law.

The Court does not interpret 20 U. S. C. § 107 so as to give licensed blind persons the exclusive right to operate vending machines in buildings controlled by the Post Office Department. Though the contention is advanced by plaintiffs that regulations under which defendants claim authority to dispossess them are not only invalid because in contravention of the provisions of 20 U. S. C. § 107, but because these regulations were not made after consideration with the Secretary, and with "the approval of the President," as that law requires, the Court must find from the record before it that the published regulations are, by law, prima facie evidence of the text of the original

documents and are required to be judicially noticed. 44 U. S. C. § 307. They have the force and effect of law. *Federal Crop Insurance v. Merrill*, 332 U. S. 380; *United States v. Millsap*, 208 F. Supp. 511, 516. Though the presumption of the validity of a regulation published in the Federal Register may be overcome, the contention here that the President did not approve the regulation so adopted and filed cannot be sustained because it appears that the authority of the President to approve the regulation was by him legally delegated to the Director of the Bureau of the Budget, and there is no showing that such approval was not given. Presumably, it was.

The Court must determine from the record before it that under validity adopted regulations, the defendants have acted within the authority granted to them. The plaintiffs do not have, under the provisions of 20 U. S. C. § 107, nor under any regulation thereunder, the irrevocable right to receive the profits from vending machines not operated in conjunction with a blind licensee's stand and not in the same building. The agreement under which the machines had been operated for plaintiffs' benefit was specifically subject to termination by the defendants, and such termination is not unauthorized or illegal. The fact that income from the machines may be diverted to Postal Employees' Associations is not an act which plaintiffs have standing to challenge. There is no invasion of the legal rights of plaintiffs which they have standing to protect and though the disposition of the income from operations of the vending machines may be illegal, as plaintiffs assert, still they lack standing to enjoin such action and the officials of the Post Office Department because no invasion of their legal rights exists. *Perkins v. Lukens Steel Co.*, 310 U. S. 113; *Tennessee Power v. T. V. A.*, 306 U. S. 118; *Mine Safety Co. v. Forrestal*, 326 U. S. 371. Nor can the Court sustain the claim of plaintiffs that defendants' acts were arbitrary and

capricious. A court may not say that where an official does an act within the permissible limits of his authority, that an act is arbitrary and capricious. See 2 Am. Jur. 2d, page 541, Administrative Law, § 671. Though plaintiffs present a situation strongly appealing to this Court's sense of what is right and just, the appeal for change in the rules, which the Court is bound to follow, must be made to the Legislative Branch of the Government, for the Court believes that the proper construction of the applicable provisions of law and the rules and regulations adopted thereunder compels a determination that defendants' motion for summary judgment must be granted and the motion of the plaintiffs for summary judgment must be denied.

IT IS SO ORDERED.

Dated at Topeka, Kansas, this 23rd day of October, 1968.

/s/ GEORGE TEMPLAR
United States District Judge

In the District Court

of the United States

For the District of Kansas

ADAM WILSON, *Plaintiff*,
vs.
MARVIN WATSON, Postmaster General of the United States, et al., *Defendants*.

Civil Action No. KC-2793

JOE LOYA and STATE BOARD OF SOCIAL WELFARE, DIVISION OF SERVICES FOR THE BLIND, *Plaintiffs*,
vs.
MARVIN WATSON, Postmaster General of the United States, et al., *Defendants*.

Civil Action No. T-4483

Judgment

This action came on for hearing before the Court, Honorable George Templar, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered;

IT IS ORDERED AND ADJUDGED that defendants' motion for summary judgment be, and the same is hereby sustained; and the motion of plaintiffs for summary judgment be, and the same is hereby overruled; and that judgment for costs be, and it is hereby entered against the plaintiffs.

Dated at Topeka, Kansas, this 28th day of October, 1968.

GEORGE TEMPLAR
United States District Judge

Submitted by
BENJAMIN E. FRANKLIN
United States Attorney

By THOMAS E. JOYCE
Assistant United States Attorney
156 Federal Building
Kansas City, Kansas 66101
Attorney for Defendants

United States Court of Appeals

Tenth Circuit

January 1970 Term

ADAM WILSON, *Plaintiff-Appellant,*

vs.

WINTON M. BLOUNT, Postmaster General of the United States, et al., *Defendants-Appellees,*

and

STATE BOARD OF SOCIAL WELFARE, DIVISION OF SERVICES FOR THE BLIND,
Defendant-Appellant.

JOE LOYA and STATE BOARD OF SOCIAL WELFARE, DIVISION OF SERVICES FOR THE BLIND,
Plaintiffs-Appellants,

vs.

WINTON M. BLOUNT, Postmaster General of the United States, et al., *Defendants-Appellees.*

No. 127-69

Appeal from the United State District Court for the District of Kansas

District Court No. T-4483

Durward K. McDaniel, Washington, D. C., for Wilson and Loya, Appellants; and Charles V. Hamm, State Board of Social Welfare, Topeka, Kansas, for State Board of Social Welfare, Division of Services for the Blind, Appellant.

Stephen R. Felson, Department of Justice, Washington, D. C. (William D. Ruckelshaus, Assistant Attorney General, Robert J. Roth, United States Attorney, and Alan S. Rosenthal, Attorney, with him on the brief), for Appellees.

Before MURRAH, Chief Judge, HILL and HICKEY, Circuit Judges. *Per curiam.*

This appeal is from a Judgment of the District Court of Kansas sustaining defendants' motion for summary judgment and overruling plaintiffs' motion for summary judgment. The critical question is whether a blind person operating a vending stand in the Federal Court House in Kansas City, Kansas, pursuant to 20 U. S. C. Section 107 (commonly known as the Randolph-Sheppard Act) is entitled to enjoin the Postmaster General from removing vending machines located in another federal building and from which the blind person receives income.

Judge Templar sustained subject matter jurisdiction and held that removal of the vending machines did not violate any of the plaintiffs' rights vested under 20 U. S. C. Section 107. We have examined the records and briefs and conclude that the judgment of the trial court is clearly right and should be affirmed for the reasons stated in Judge Templar's comprehensive MEMORANDUM OF DECISION, ____ F. Supp. ____.

JUDGMENT AFFIRMED.

Subchapter G—Special Regulations

PART 614—VENDING STANDS AND VENDING MACHINES

Sec.

614.1 Authorizations.

614.2 Installation, maintenance, and operation.
614.3 Modification, relocation, or removal.
614.4 Articles to be sold or vended.
614.5 Survey of vending stand opportunities.

AUTHORITY: The provisions of this Part 614 issued under 5 U. S. C. 301, 39 U. S. C. 501.

SOURCE: The provisions of this Part 614 appear at 32 F. R. 4411, Mar. 23, 1967, unless otherwise noted.

§ 614.1 AUTHORIZATIONS.

(a) *To certified blind persons.* Blind persons, when available and duly certified by a State licensing agency, designated by the Department of Health, Education, and Welfare, shall be authorized and have preference in the installation and operation of vending stands on property operated, maintained, and protected by the Post Office Department: *Provided,* That in the judgment of the Post Office Department, the installation and operation of the stands are considered practicable and will not unduly inconvenience the Post Office Department or adversely affect the interests of the United States.

(b) *Preparation and submission of applications.* Applications for installation and operation of vending stands, including vending machines operated in connection with the stands, to be operated by licensed blind persons in post office lobbies or other public areas, shall be submitted by the State licensing agency in quadruplicate on the form provided by the Department of Health, Education, and Welfare to the postal official in charge of the building involved for his recommendation for approval or disapproval. If the official in charge recommends approval he shall sign all four copies on the line designated "Officer in charge of building" and transmit all copies to the director, engineering and facilities division for the region in which the building is located for approval or disapproval. If an application by a State licensing agency for a permit to establish a vending stand under the Randolph-Sheppard Vending Stand

Act is not recommended for approval by the official in charge, the transmittal shall show reasons for the disapproval. Applications submitted by postal officials will be reviewed by the director, engineering and facilities division. If approved by him, he will sign all four copies of the form on the line designated "Official of U. S. Department having jurisdiction over building" and will retain one copy. Three copies, including the action taken, will be returned to the official concerned. He shall retain one copy in his files and transmit the others to the State licensing agency making application. If the director, engineering and facilities division, disapproves the application he shall advise the postmaster and applicant of the reasons.

(c) *Reports.* At the end of each fiscal year the director, engineering and facilities division shall report to the Director, Realty Division, Bureau of Facilities, the number of applications for vending stand permits received during the fiscal year, number accepted, number denied, and number still pending in his region.

(d) *Appeals.*—(1) *Installation, maintenance and operation.* If an application by a State licensing agency for a permit to install and operate a vending stand is not approved by the director, engineering and facilities division, the agency may appeal his decision. The appeal shall be made within 10 days to the Assistant Postmaster General, Bureau of Facilities through the Regional Director in the region denying the application. Upon appeal the Regional Director will direct a full investigation obtaining a report from the director, engineering and facilities division and from the State licensing agency. The Regional Director will report his findings and make recommendation within 20 days after receipt of the appeal to the Assistant Postmaster General, Bureau of Facilities, who will render a final decision for the Post Office Department within 90

days of filing of the appeal. The appellate procedure is also available when the State licensing agency and the local installation's manager or the director, engineering and facilities division, fail to reach agreement concerning revocation or modification of a permit, suitability of a stand location, or method of operation of the stand. After a review of the findings, if in the judgment of the Regional Director the appeal should be allowed, he shall notify the State licensing agency without forwarding the case to the Assistant Postmaster General, Bureau of Facilities. If he determines the decision of the director, engineering and facilities division, or the local installations manager should be upheld, he must notify the Assistant Postmaster General, Bureau of Facilities, who will make the final decision.

(2) *Services and assignment of proceeds.* If the local installation's manager and the State licensing agency fail to reach agreement concerning the assignment of proceeds or services to be rendered by the vending stand operator (including articles which may be sold) a State licensing agency may appeal the decision. The appeal shall be made within 10 days to the Assistant Postmaster General, Bureau of Personnel, through the Regional Director in the region denying the application. Upon appeal the Regional Director will direct a full investigation obtaining a report from the special assistant for employee relations and from the State licensing agency. The Regional Director will report his findings and make recommendation within 20 days after receipt of the appeal to the Assistant Postmaster General, Bureau of Personnel, who will render a final decision for the Post Office Department within 90 days of filing the appeal. After a review of the findings, if in the judgment of the Regional Director the appeal should be allowed, he shall notify the State licensing agency without forwarding the case to the Assistant Postmaster General, Bureau of Personnel. If he determines the decision of the special

assistant for employee relations or local installation's manager should be upheld, he must notify the Assistant Postmaster General, Bureau of Personnel, who will make final decision.

(e) *Approval of equipment plans.* Vending equipment shall be designed, arranged, and installed in a manner to facilitate sanitary operation. Plans of proposed vending stand equipment shall be submitted by the State licensing agency to the official in charge of the postal installation for approval prior to installation.

§ 614.2 INSTALLATION, MAINTENANCE, AND OPERATION.

(a) *Installation and maintenance.* Installation, maintenance, repair, replacement, servicing, or removal of vending stand equipment or vending machines operated in connection with vending stands shall be without expense to the Post Office Departent except that the cost of utilities required to operate vending stands and vending machines under the control of blind persons authorized to operate such stands and machines will be borne by the Post Office Department. In the case of vending machines operated by employees' committees, the Department shall be reimbursed for utilities.

(b) *Operation*—(1) *Sanitation standards.* Vending stands shall be operated in compliance with local health and sanitation standards and codes.

(2) *Cleaning and janitor service.* The operator shall arrange for cleaning and janitor service sufficient to maintain vending areas at stands and machines in a clean and orderly condition.

(3) *Violations.* Authorization for establishing a vending stand, with the regulations and policies established by the Post Office Department and State licensing agency, shall govern the operation of each vending stand. Ordinarily, day-by-day matters concerning the operation of the stand can best be resolved on a local basis with the blind oper-

ator. Officials in charge should not confer with attorneys or others claiming to represent blind operators. Violations of regulations or policy, and other unresolved relevant matters, must be reported to the State licensing agency. If appropriate corrective action is not taken, the installation head shall notify the director, engineering and facilities division who will resolve the matter or submit it to the Department with all facts so that it can in turn be resolved by the Department with the Department of Health, Education, and Welfare. If the matter concerns vending machines operated by postal employee committees, or otherwise concerns postal employees, the director, engineering and facilities division will coordinate with the regional special assistant for employee relations in resolving the issues.

§ 614.3 Modification, Relocation, or Removal.

The Post Office Department reserves the right to require State licensing agencies to arrange for modification, removal, or relocation of vending stands established under the Randolph-Sheppard Vending Stand Act (20 U. S. C. 107-107f) when necessary because of changes in building operations or space requirements.

§ 614.4 Articles To Be Sold or Vended.

(*a*) *Approved articles.* Vending of the following at vending stands operated by licensed blind persons is approved: Newspaper, periodical, confections, tobacco products, articles in individual containers or wrappers in which they are placed before receipt by the vending stand operator, and such other suitable articles as may be approved for each location by the postal official in charge and State licensing agency. These articles also may be vended through vending machines operated in connection with vending stands.

(b) *Objectionable publications.* Licensed vending stand operators and State licensing agencies shall use dili-

gence and good judgment and cooperate with postal authorities in preventing the keeping on the premises, for disposal to the public by sale or otherwise, of any so-called comic books or any other printed or written matter of an objectionable, subversive, or controversial nature which may subject the Post Office Department to public criticism. Violations of this section shall be reported to the Assistant Postmaster General, Bureau of Operations, Classification and Special Services Division, with a copy of the objectionable matter.

§ 614.5 SURVEY OF VENDING STAND OPPORTUNITIES.

Postal officials shall cooperate with State licensing agencies in making surveys of vending stand opportunities for blind persons on properties under their control and in selecting locations, for such stands and the types of stands to be provided.

[B-111086]

Vending Machines—Disposition of Receipts

Funds derived from the installation and operation of vending machines on Government-owned or controlled property are required to be deposited into the Treasury of the United States as miscellaneous receipts under the provisions of section 3617, Revised Statutes, and may not be used to finance employee recreation and welfare activities.

COMPTROLLER GENERAL WARREN TO THE ATTORNEY GENERAL, AUGUST 29, 1952:

Reference is made to your letter of July 28, 1952, relative to the disposition of funds received by the Federal Bureau of Investigation in connection with the installation of vending machines in certain of its divisional offices located throughout the United States and its possessions.

Your letter states that vending machines dispensing such items as cigarettes, coca colas, and candy have been in-

stalled in certain offices of the Federal Bureau of Investigation occupying Government-owned space and private property leased to the Government, and that the remuneration received from the operation thereof is deposited by the particular office in its recreation fund for the purpose of sponsoring employee activities in athletics, and in providing flowers, fruits, and gifts for employees on extended sick leave. However, in the light of the report of this Office to the Congress of August 10, 1949, B-45101, you request to be advised whether the funds derived from the installation and operation of the vending machines may continue to be so utilized by the said offices, or whether such funds should be deposited into the Treasury as miscellaneous receipts.

The cited report of August 10, 1949, requested the attention of the Congress to the improper diversion of a wide variety of substantial sums of money, including receipts derived from the installation and operation of automatic coin-operated vending machines, coming into the hands of officers and employees of the United States by reason of the operation of various official and quasi-official income-producing activities in the several departments and establishments of the Government. At page 5 of the said report it was stated:

> The first question which has engaged the attention of the General Accounting Office concerns the authority to withhold from the Treasury revenues, donations and contributions, accruing from activities carried on in connection with the transaction of the regular business of the Government. It seems to me to be self-evident that these funds—arising as they do from the transaction of the business of the Government and used, according to administrative officers, as adjuncts thereto—necessarily are impressed with the character of funds received for the use of the United States. Under existing law funds received for use of the United States generally are required to be deposited in the Treasury, to be disbursed therefrom only in accordance with authority granted by the Congress. I find no express or clearly implied exception by the Congress in respect of the question-

able matters brought to light in this report. Accordingly, the practice of diverting the funds from the Treasury to various "welfare" and other purposes not affirmatively prescribed by the Congress would appear to be of doubtful legal propriety at best.

Elsewhere in the said report there was pointed out and discussed the practical and legal issues involved in the application of statutes requiring the deposit of such funds into the Treasury of the United States, and the use of public property and funds in connection therewith, and, in that regard, there was recognized the place and desirability of employee welfare and related activities in the Government service. The Congress, accordingly, was urged to enact clarifying legislation which would resolve such issues, and rectify existing unsatisfactory conditions with respect to the accounting for, disposition, and use of the funds involved. In that connection, H. R. 6325, 81st Congress, 1st Session, entitled "A BILL To provide for the establishment, operation, and financial control of income-producing activities in the Government, not otherwise specifically provided for by law, and for other purposes," was introduced and referred to the Committee on Expenditures in the Executive Departments. The bill was not reported out by the Committee.

One of the statutes cited in the report of August 10, 1949, is section 3617, Revised Statutes, 31 U. S. C. 484, which provides as follows:

> The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided in section 487 of this title, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post Office Department.

It has been the consistent view of the General Accounting Office that funds derived from the installation and op-

eration of vending machines, on Government-owned or controlled property, are funds received "for the use of the United States", within the meaning of that phrase as used in the provision of law quoted above and, as such, are required to be deposited into the Treasury of the United States as miscellaneous receipts, in the absence of express statutory authority to the contrary. No express provision of law to the contrary with respect to the receipts here involved has been found.

Accordingly, I have no alternative but to advise that the funds so received by the Federal Bureau of Investigation from the installation of vending machines are required to be deposited into the Treasury of the United States as miscellaneous receipts under the provisions of section 3617, Revised Statutes, *supra*.

[B-112840]

VENDING MACHINES—OPERATION BY EMPLOYEE GROUPS AND BLIND PERSONS—DISPOSITION OF RECEIPTS

Blind Persons who are granted permission to operate vending stands on Government-owned or controlled property, under the act of June 20, 1936, and who, with the administrative approval of the agency concerned, operate vending machines as part of or in conjunction with the operation of such stands, may retain the proceeds derived from the machines, whether the machines are situated adjacent to the vending stands or located in some other part of the building.

Where Contractual Arrangements for the installment purchase, installation, and operation of vending machines on Government-owned or controlled property are made by employee groups with administrative approval and with the understanding that any funds received by such groups from the operation of the machines could be retained by the employees for general welfare activities, the General Accounting Office will not object to the continued use of such funds for employee general welfare activities pending the enactment of clarifying legislation, even though the legal authority of administrative officials to agree to such arrangements is doubtful in

view of the miscellaneous receipt deposit requirements of section 3617, Revised Statutes.

COMPTROLLER GENERAL WARREN TO THE POSTMASTER GENERAL, DECEMBER 10, 1952:

Reference is made to your letter of November 17, 1952, with enclosure, in which you refer to Office decision of August 29, 1952, B-111086, 32 Comp. Gen. 124; to the Attorney General, relative to the disposition of proceeds derived from the installation and operation of vending machines on Government-owned or controlled property, and request a decision on three questions hereinafter set forth.

You cite the act of June 20, 1936, 49 Stat. 1559; often referred to as the Sheppard-Randolph Act, which authorizes blind persons to operate vending stands in Federal buildings, and state that, in accordance therewith, blind persons operate stands in the lobbies of Government-owned post office buildings under your administration, but the sales thereat have been limited to goods of a "dry" nature under the provisions of section 2 (a) (4) thereof. It is stated further that, recently, the Department approved the installation of soft drink vending machines in both Government-owned and leased premises on an experimental basis; that, in the case of these properties where a blind-operated stand has been functioning, the postmaster has been instructed to determine the location of such machines and to have the operation and servicing thereof under the direction of the operator of the stand, the profits accruing to that person subject to the regulations of the State Licensing Agency designated by the Office of Vocational Rehabilitation to supervise the operation of such stands; and that, where there is no stand operated by a blind person, postal employees, as a group or through a representative committee, have been permitted, subject to the approval of the postmaster, to handle arrangements for installing and servicing the vending machines, with profits, if any, to be used

for general welfare activities and not to accrue to any individual.

It is explained in the letter enclosing a copy of letter from the Secretary of the United National Association of Post Office Clerks that postal employee groups of the Philadelphia, Pennsylvania, Post Office, with approval of the Department, entered into a contract with Muzak Company for the installation of piped-in music to the said Post Office, and that, in addition to a partial payment of approximately $3,500, a balance of over $9,000 and monthly operating charges remain to be paid from the proceeds to be derived from the machines. It is also indicated to be your understanding that employee groups at other post offices have entered into contracts for the purchase of vending machines, which contracts contemplate payment therefor on an installment basis from the profits to be derived from the operation thereof.

In view of the above, you request decision as follows:

1. In the event permission is granted to a blind person to operate a vending stand in a building under the administration of the Post Office Department in accordance with the provisions of the Sheppard-Randolph Act, may the proceeds accrue to the operator of the stand?

   a. If the vending machine is immediately adjacent to the vending stand?

   b. If the vending machine is located in some other portion of the building?

2. If there is no stand in the building operated under the provisions of the Sheppard-Randolph Act, may the profits of vending machines in the building be used for general welfare activities of the employees, or must they be deposited into the Treasury as Miscellaneous Receipts?

3. If your answer to question number two (2) is to the effect that said profits must be deposited in the Treasury of the United States, may such action be held in abeyance pending the liquidation

of contractual obligations entered into by postal personnel on the assumption that those profits could be used for such purpose?

Section 1 of the act of June 20, 1936, *supra*, provides:

> That for the purpose of providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting blind persons licensed under the provisions of this Act shall be authorized to operate vending stands in any Federal building where, in the discretion of the head of the department or agency in charge of the maintenance of the building, such vending stands may be properly and satisfactorily operated by blind persons.

In view of such language and of the nature and purpose of the statute, if it be administratively determined desirable for blind persons to operate vending machines as a part of, or in conjunction with the operation of, a vending stand, it would appear immaterial whether the vending machines are situated adjacent to a vending stand or located in some other part of the building. Accordingly, parts a and b of question 1 are answered in the affirmative.

With respect to your second question, it was stated in the referred-to decision of August 29, 1952, that funds derived by the Government from the installation and operation of vending machines on Government-owned or controlled property are funds received "for the use of the United States" within the meaning of that phrase as used in section 3617, Revised Statutes, 31 U. S. C. 484, and, as such, are required to be deposited into the Treasury of the United States as miscellaneous receipts, in the absence of express statutory authority to the contrary. It was therein concluded that the funds so received by the Federal Bureau of Investigation from the installation of vending machines are required to be so deposited.

However, in the matter under consideration it appears that contractual arrangements for the installment purchase, installation, and operation of vending machines at various

post offices were made by postal employee groups with administrative approval, and with the understanding that any proceeds received by the employee groups from the operation of the machines could be retained by them. While the legal authority of the administrative officials to have agreed to such an arrangement is doubtful, it has been concluded that this Office will interpose no objection to the continued use of proceeds derived by employee groups from the operation of such machines for employee general welfare activities pending further action in the matter by the Congress in the form of clarifying legislation as recommended in the report of this Office to the Congress, August 10, 1949, B-45101.

In view of the answer to question 2, answer with respect to the third question appears unnecessary.

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